Supreme Court, U.S.
FILED
SEP 15 2005

No. 05-359

IN THE

Supreme Court of the United States

HERBERT SMITH, and all similarly situated bail agents doing business as, EXPRESS BONDS INCORPORATED, INDIANA SURETY BAIL AGENTS ASSOCIATION INCORPORATED, MIDWEST BONDING INCORPORATED, *et al.*,

Petitioners,

v.

CITY OF HAMMOND, HAMMOND CITY COURT, JEFFREY A. HARKIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Petitioners' Verified Amended Complaint state a claim upon which relief could be granted?

2. Did the district court commit error by not converting respondents' 12 (c) Motion for Judgment on the Pleadings to motion for summary judgment?

3. Is a Section 1983 action against a municipal subdivision, the City Judge, the City Clerk and the Police Chief to prevent prospective enforcement of a practice that prohibits private, licensed insurers and surety bail agents over whom the City Judge has no jurisdiction, from using their licenses to write surety bonds for persons incarcerated in the Hammond City jail charged with misdemeanor criminal offenses, proper?

4. Does judicial immunity absolutely insulate judges and government officials from declaratory or injunctive relief when they enforce a practice that prohibits private licensed insurers and surety bail agents, over whom the Judge has no jurisdiction, from using their licenses to write surety bonds for persons charged with misdemeanor criminal offenses?

5. Does judicial immunity absolutely insulate judges and government officials from declaratory or injunctive relief when they enforce a practice that prevents private licensed surety bail agents access to state jails to write bonds for persons charged with misdemeanor criminal offenses in a Municipal or State Court?

6. Does an insurer have a property or liberty interest in a state issued Certificate of Authority and license which entitle it to engage in the business of insurance?

7. Does a bail agent have a property or liberty interest in a state issued license which entitles him or her to perform any of the functions, duties or powers prescribed for bail agents under state law?

8. Did the district court commit reversible error by failing to convert and treat the respondents' 12 (c) Motion for Judgment on the Pleadings as a Motion for Summary Judgment, after matters outside the pleadings were presented and not excluded by the court?

9. Did the district court commit reversible by failing to give reasons and explanations as to the facts as to the facts and law leading to the ultimate conclusion to dismiss Petitioners' Verified Amended Complaint with prejudice?

10. Does the dismissal with prejudice of all claims set forth in a verified complaint by a District Court, including, but not limited to, Fourteenth Amendment, Sherman Act and state law claims, based on the suggestion, by the Court of Appeals in affirming the denial of a Motion for Preliminary Injunction, that the complaint be dismissed, constitute an abuse of discretion in a manner that is inconsistent with due process?

11. Does the appeal as of right, from the dismissal with prejudice of Petitioners' verified complaint, which was rationally related to existing law and credible factual allegations, amount to a frivolous appeal?

12. Does a Court of Appeals abuse its discretion when it sanctions Petitioners' attorney for filing an appeal of the dismissal of petitioners' verified complaint under the facts and circumstances of this case?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

1. Express Bail Bonds Incorporated is an Indiana Corporation. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in the Express Bail Bonds Incorporated.

2. Fidelity Insurance Co. has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Fidelity Insurance Co..

3. Allegheny Casualty Co. has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Allegheny Casualty Co.

4. American Surety Co. has no parent corporation. It issues no stock. No publicly held company has any ownership interest in American Surety Co.

5. Midwest Bonding Co. has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Midwest Bonding Co.

6. Indiana Surety Bail Agents Association, Inc. has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Indiana Surety Bail Agents Association, Inc.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial by the District Court of Motion for Preliminary Injunction is reported at *Smith v. City of Hammond Indiana*, 388 F.3d 304 (7th Cir. 2004)

On remand, the district court on December 15, 2004 entered an Order, stating "[a]fter due consideration, and in light of the analysis contained in *Warren v. City of Hammond, Indiana*, 388 F.3d 304 (7th Cir. 2004)" Motion for Judgment on the Pleadings filed by the defendants is Granted. The Clerk is Ordered to Dismiss with Prejudice Plaintiff's claims. The Clerk is further ordered to close this case.

The Seventh Circuit's Per Curiam opinion affirming the District Court's dismissal of petitioners' Verified Complaint was rendered June 17, 2005.

The Seventh Circuit Order sanctioning petitioner's attorney for filing a frivolous appeal from the District Court's Dismissal of petitioners' Verified Complaint was rendered on August 29, 2005.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are reprinted in the Appendix at pages 23a-29a.

STATEMENT OF THE CASE

1. Petitioners sought declaratory and injunctive relief with respect to the enforcement of an exclusive "cash only" bail bond policy of the Respondent City of Hammond, Indiana, a political subdivision of the State of Indiana enforced by the City Clerk, Chief of Police and the City Judge.

Petitioners' brought their claim after Midwest Bonding's surety bail agent, Herbert Smith d/b/a as Express Bail Bond, Inc., wrote a surety bond for Leatrice Warren who was incarcerated in the Hammond City Jail and the Petitioner surety bail agent was prevented from posting a surety for her release. Petitioners are insurers; surety bail agents; surety bonding agencies and members of the state surety bail agents association who hold state issued Certificates of Authority to conduct surety insurance business; and state issued licenses to operate and function as bail agents and are granted access to the jails of the state to write surety bonds.

The gravamen of petitioners' claim is that respondents have in place and enforce a policy pursuant to which they prevent insurers and their surety bail agents from posting surety bonds for individuals charged with misdemeanor criminal offenses.

Petitioners filed their original Verified Complaint and Motion for Temporary Restraining Order and Preliminary

Injunction (the "Motion") on December 22, 2003. The district court, prior to summons being served on respondents; prior to appearance by respondents; prior to any response by respondents to the Motion; and without hearing, entered its Order on December 23, 2003 denying the Motion in its entirety.

Petitioners filed their Notice of Appeal of the interlocutory order denying the Motion on January 22, 2004.

Petitioners filed their First Verified Amended Complaint on January 22, 2004.

Short record sent to Court of Appeals on January 29, 2004.

Respondents filed Answer to First Amended Complaint on February 11, 2004.

Telephonic Rule 16 Preliminary Pretrial Conference held on March 3, 2004.

Order issued Controlling Final Pretrial Conference and Trial on March 8, 2004.

Petitioners' filed Second Verified Amended Complaint on May 3, 2004.

Respondents' filed Answer to Second Verified Amended Complaint on May 25, 2004.

Letter from Seventh Circuit Court of Appeals requesting record on appeal entered on July 8, 2004.

Respondents filed Motion for Leave to File Amended Answer on September 16, 2004.

Respondents' filed Motion for Protective Order on September 21, 2004.

Order denying Motion for Protective Order entered on September 22, 2004.

Respondents filed Motion to Stay Proceedings Pending Appeal on October18, 2004.

Order granting Respondents' Motion for Leave to File Amended Answer entered on October 19, 2004.

Respondents file Motion for Judgment on the Pleadings on November 24, 2004.

Mandate of Court of Appeals affirming judgment of District Court entered on November 30, 2004.

Petitioners' filed Memorandum in Opposition to respondents' Motion for Judgment on the Pleading on December 13, 2004.

On remand, the district court on December 15, 2004 granted respondents' Motion for Judgment on the Pleadings and Ordered the Clerk to Dismiss with Prejudice petitioner's claims. The Clerk was further ordered to close the case.

Clerk's Entry of Judgment in favor of respondents and against the petitioners was entered on December 16, 2004.

Petitioners' filed Notice of Appeal on January 13, 2005.

The Seventh Circuit's Per Curiam opinion affirming the District Court's dismissal of petitioners' Verified Complaint was rendered June 17, 2005.

The Seventh Circuit Order sanctioning petitioner's attorney for filing a frivolous appeal from the District Court's Dismissal of petitioners' Verified Complaint was rendered on August 29, 2005.

The jurisdiction of the United States District Court for the Northern District of Indiana was based on 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. §§ 1983, 1988; 15 U.S.C. § 2; the First and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit Court of Appeals, in this case, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power based on the following particulars:

A. Interlocutory decision affirming denial of Motion for Preliminary Injunction.

The Court of Appeals for the Seventh Circuit of Appeals in a published opinion, affirming the District Court Order denying Motion for Preliminary Injunction, extensively discussed the pros and cons of petitioners' verified complaint, without deciding the case on the merits, "suggest[ed] that the district judge dismiss it without further ado. If Smith persists in this hopeless litigation, he-and his lawyer-are courting sanctions." The Court remanded the case to the district court.

B. Rule 12 (c) Motion for Judgment on the Pleadings

On December 15, 2004 the District Court dismissed the underlying suit with prejudice by granting a Rule 12 (c) Motion for Judgment on the Pleadings based on matters outside the pleadings which were presented to and not excluded by the court. The matter presented outside the pleadings was the Court of Appeals decision affirming the denial of the Motion for Preliminary Injunction. Respondents' motion was based solely on the law of the case doctrine.

Under the law of the case doctrine, one panel of an appellate court will not reconsider questions which another panel has decided on a prior appeal in the same case. This doctrine is not applicable where the previous appellate decision did not issue on the merits. *Southco v. Kanebridge Corp.*, 324 F.3d 190 (3rd Cir. 2003); *United States v. Vigneau*, 337 F.3d 62, 67 (1st Cir. 2003); *Trent v. Valley Elec. Assn., Inc.*, 195 F.3d 534 (9th Cir. 1999); *Jarrard v. CDI Telecommunications, Inc.*, 04-1992 (7th Cir. 2005); *Wilmer v. Board of Cty Comm'rs*, 69 F.3d 406 (10th Cir. 1995); *Kennedy v. Lubar*, 273 F.3d 1293 (10th Cir. 2001); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2005); *See also* Wright & Miller § 4435, at 329 The law of the case doctrine presumes a hearing on the merits. *United States v. Hatter*, 532 U.S. 557 (2001); *Univ. of Tex. v. Camenisch, Id.*

By the plain language of Rule 12 (c), when the respondents submitted the Court of Appeals decision affirming the denial of petitioners' Motion for Preliminary Injunction, the district court was obligated to either not consider the extraneous submission in ruling on the motion or to convert the motion to one for summary judgment and provide the parties with an opportunity to submit

supplementary materials. *Jacobs v. City of Chicago*, 215 F.3d 758 (7th Cir. 2000); *Carter v. Stanton*, 405 U.S. 669 (1972)

The district court in this case characterized its decision as a Rule 12 (c) judgment on the pleadings, which can be upheld only if it appears beyond doubt that the non-movant can prove no set of facts that would support its claim for relief. *Church v. General Motors Corp.*, 74 F.3d 795 (7th Cir. 1996); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) Dismissal under Federal Rule 12 (c) is plenary. *See Taj Mahal Travel*, 164 F.3d at 189. We will affirm the judgment only if plaintiff would not be entitled to relief under any set of facts that could be proved. *Id.*

The District Court did not, orally or in writing, analyze the facts in relation to the law which led to the ultimate conclusion to dismiss the complaint with prejudice in violation of Circuit R. 50 which provides in pertinent part:

> Whenever a district court resolves any claim or counterclaim on the merits, terminates the litigation in its court . . . the judge shall give his or her reasons, either orally on the record or by written statement.

In this case the Court of Appeals did not enforce Rule 50 which requires a "clear explication" of the district court's reasoning. *Members v. Paige*, 140 F.3d 699, 701 (7th Cir. 1998); *Western States Ins. v.. WI Wholesale Tire*, 148 F.3d 756 (7th Cir. 1998); *Pasquino v. Prather*, 13 F.3d 1049, 1051 (7th Cir. 1994).

It is evident that the district court relied on the Court of Appeals decision and did not convert the motion to one for summary judgment therefore the district court's reliance on matters outside the complaint in ruling on the motion to dismiss was error. *Jacobs v. City of Chicago, Id; Carter v. Stanton*, 405 U.S. 669 (1972)

The discussion pertaining to the underlying claims set forth in petitioners verified complaint by the Court of Appeal was dicta and not a decision on the merits. *Milgard Tempering, Inc., v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); *Trent, Id.*; *Kool Mann Coffee & Co. v. Coffey*, 300 F.3d 340 (3rd Cir. 2002)

C. Motion to dismiss standard.

One of the most, if not the most important question presented by the appeal of the district court's order dismissing with prejudice petitioners' verified complaint, is whether the complaint stated a claim?

It is well settled that at the motion to dismiss stage of the litigation, we must accept petitioners' well pleaded allegations in the complaint as true. In appraising the sufficiency of the complaint we follow of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which should entitle him to relief. *Leatherman v. Tarrant County NICU*, 507 U.S. 163 (1993); *United States v. Gaubert*, 499 U.S. 315, 327 (1991); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957); *Rivera v. Fagundo*, 04-1401 (1st Cir. 2005); *Nechls v. Oxford Health Plans, Inc.*, 04-5100cv (2nd Cir. 2005); *Shering-Plough Corporation*

Erisa Litigation, 04-3073 (3rd Cir. 2005); *Trulock v. Freeh*, 275 F.3d 391); *Thomas v. Guardsmark, Inc.*, 381 F.3d 701 (7th Cir. 2004); *Porous Media Corporation v. National Union Fire Ins. Co.*, 186 F.3d 1077 (8th Cir. 1999); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995)

In the instant case the respondents did not make such a showing in that the case was dismissed pursuant to a 12 (c) Motion for Judgment on the Pleadings and the district court did not issue an oral or written opinin as to its reasons for dismissing the complaint.

D. Section 1983 and Judicial Immunity.

Petitioners sought declaratory and injunctive relief with respect to the respondents' enforcement of a policy against petitioners which prevented them from writing surety bonds for persons incarcerated in the Hammond City Jail on misdemeanor criminal charges under Section 1983. The U.S. Supreme Court has specifically applied the doctrine of judicial immunity to actions brought pursuant to Section 1983. *See Pierson*, 386 U.S. at 547; *Tucker v. Outwater*, 118 F.3d 930 (2nd Cir. 1997)

The Supreme Court has held that judges defending against Section 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson v. Ray*, 386 U.S. 547 (1967) However, the Supreme Court has never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief we, have not

addressed the question. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980) The Court went on to find that the Virginia Court and its Chief Justice were properly held liable in their enforcement capacities. *Supreme Court of Virginia, Id.*

In the instant case the Court of Appeals expressed its view that the respondents "would be sheltered by the Judge's absolute immunity . . . even as collaborators . . . in the absence of any established Fourteenth Amendment entitlement to issue a surety bond."

This view conflicts with case law in the Fifth Circuit. In *Baldwin v. Daniels*, 250 F.3d 943 (5th Cir. 2001), a case cited by the Seventh Circuit in its opinion in this case, the Court of Appeals in that case cited an unpublished opinion where it "assumed that Richards had a property interest in his state-issued bondsman license and that his state license could not be revoked without due process protection." The assumption referred to Baldwin fits precisely the contentions of petitioners in the instant case. *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 557 (5th Cir.1988)

A member of the panel affirming the denial of petitioners' Motion for Preliminary Injunction argued by way of dissent in *Forrester v. White*, 484 U.S. 219, 228 (1988) that judicial immunity should protect only adjudicative functions, and that employment decisions are administrative functions for which judges should not be given absolute immunity. The Jurist also argued that absolute judicial immunity should "be confined to situations where such immunity is not merely convenient but essential." *Id.*

Section 1983 only contemplates judicial immunity from suit for injunctive relief for acts taken in a judicial capacity. The statute provides that "injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . . . unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. Section 1983; *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004) In the instant case petitioners' sought declaratory relief.

Functions that might be deemed integrally related to the judicial process when undertaken in the context of a particular case may be viewed as administrative when they are undertaken outside that context, and"[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts, " *Forrester v. White*, 484 U.S. 219, 228 (1988); *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 348 (1879); *Huminski v. Corsones*, 386 F.3d 116 (2nd Cir. 2004)

The Court of Appeals in its decision affirming denial of a Motion for Preliminary Injunction in this case opined, but did not decide, that setting bail is a judicial act and that Respondent Harking is absolutely immune; and without deciding also stated that the "decision to require either a cash bond or surety bond is a discretionary act and therefore no bondsman has a sufficiently firm and definite interest in the issuance of a surety bond to be adjudged a Fourteenth Amendment property holder." First, Petitioners do not contend that the setting of bail is not a judicial act. Second and most important for purposes of this case, Indiana law does not leave the approval of tendered surety bonds to the discretion of the Judicial officer. *Neuwirth, supra.*

Petitioners' seek declaratory and injunctive relief against the enforcement of an exclusive, cash only, bail bond policy which prevents private licensed insurers and their licensed bail agents, over whom the City Judge has no jurisdiction, from issuing and writing surety bonds for persons incarcerated in the Hammond City Jail, *after* the Court has set bail. The City Judge when enforcing the policy is not acting within his judicial capacity because he is implementing and enforcing the policy thereby disqualifying him from judicial immunity.

In *Leclerc v. Webb*, 03-30752 (5th Cir. 2005) the Fifth Circuit Court of Appeals, which appears to be the only circuit to have interpreted the Federal Courts Improvement Act of 1996 (FCIA) section 1983 amendment, held that the act only precludes injunctive relief for suits against a judicial defendant acting in his "judicial capacity." The court went on to hold in that case that to the extent that plaintiffs seek declaratory and injunctive relief against the *enforcement* (original) of Section 3 (B) only, the court and its individual members are subject to the instant suits. *See Wolfe v. Strankman*, *supra*; *Pulliam v. Allen*, 466 U.S. 522 (1984); *Mitchell v. Fishbein*, 377 F.3d 157 (2nd Cir. 2004); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311 (1st Cir. 1992) The question of availability of declaratory and injunctive relief against the enforcement of the exclusive cash only bail bond policy implemented by the respondents, appears to be one of first impression in all circuits.

It is the contention of petitioners that the City of Hammond, a political subdivision of the State of Indiana, the Judge of the Hammond City Court, the City Clerk, and the Chief of Police are not absolutely immune from liability for the enforcement of a bail bond policy against private

insurers and their surety bail agents who are licensed by the State of Indiana to issue and write surety bonds through out the state and by statute entitled to have access to the jails of the state for the purpose of writing surety bonds and that such enforcement deprives the petitioners' of their property and liberty interest in their licenses and Certificates of Authority issued by the state in violation of the Fourteenth Amendment to the United States Constitution.

The respondents' enforcement of the policy against private insurers and their surety bail agents is tantamount to termination of their state issued licenses in the City of Hammond, without due process. If the City of Hammond were successful in enforcing such a policy, insurers and bail agents in each city across the state would be subject to the same deprivation as petitioners. The implementation and enforcement of the exclusive cash only bail bond policy of the Hammond City Court, if permitted to stand, would give the Town and City Courts across Indiana and the country, the authority to individually terminate insurers and surety bail agent's licenses operating in their domains without due process and ultimately force them out of their businesses and profession.

E. Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV Section 1. Accordingly, the procedural protections of the Due Process Clause will only be triggered if state action implicates a constitutionally protected interest in life, liberty, or property. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972) Procedural due process

rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. *Cary v. Piphus*, 435 U.S. 247, 259 (1978) Thus it follows that a plaintiff cannot under Section 1983 complain of procedural due process violations unless the state has first deprived him or her of such a constitutionally protected interest. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)

In a procedural due process claim, "the deprivation by state action of a constitutionally protected interest in life, liberty, or property,' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)

To have a property interest in a benefit, a person clearly must have more than an interest, need, or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it. *Bd. of Regents, Id.* It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. *Id.*

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Id.*

In determining whether a given benefits regime creates a property interest protected by the Due Process Clause, we look to the statutes and regulations governing the distribution of benefits. *See Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 175 (2nd Cir. 1991). Where those statutes or regulations "meaningfully channel official discretion by mandating a defined administrative outcome," a property interest will be found to exist. *Kapps v. Wing*, 03-9117-cv (2nd Cir. 2005) Thus petitioners claim an entitlement to the benefits to write surety insurance policies and write surety bonds throughout the State under their licenses which are grounded in the statutes defining eligibility for them. *Id.*; *See* Appdx. F.

A state-created liberty interest arises when a state imposes "substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). We determine whether a state law creates an enforceable liberty interest by "examin[ing] closely the language of the relevant statutes and regulations. *Thompson*, 490 U.S. at 461. "The most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making, and further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* at 462; *See* Appdx. F.

The Court also articulated a requirement that statutes and regulations must contain "'explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Id.* at 463. "In sum, the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a liberty interest." *Id.*

Procedural due process entitles a person to a hearing before being deprived of an interest protected by the Fourteenth Amendment. *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972) Judicial recognition of the entitlement theory originates with *Goldberg v. Kelly*, 397 U.S. 254 (1970) Goldberg established the general principle that some governmental benefits constitute a special form of property called "entitlements" that will receive due process protection. Goldberg held that procedural due process required a hearing with "minimum procedural safeguards" prior to the termination of such benefits. *Id.* Neither the City of Hammond, the City Judge, the City Clerk or the City Police Chief held a hearing before they began enforcement of a policy which prevented petitioners from issuing surety insurance and their surety bail agents from writing surety bonds for persons incarcerated in the Hammond City Jail.

Petitioners contend that they have a liberty and property interest, created under State law, in Certificates of Authority and licenses issued by the State of Indiana to engage in the insurance business and the surety bail bond agent business as set forth in the relevant statutes of the State of Indiana. They further contend that the respondents by implementing and enforcing an exclusive cash only bail bond policy that prevents them from issuing surety insurance and writing surety bail bonds in the City of Hammond, without notice or hearing, violate the due process clause in that the action deprives them of interests and entitlements they had already acquired in the specific benefits granted under state law. *Bd. of Regents*, *supra*. The fact that the petitioners' Certificates of Authority and licenses can only be terminated for just cause or specified reasons their expectation of continuing to receive the benefits to which their licenses entitle them to receive is sufficient to invoke the protections

of the Fourteenth Amendment. *Brown v. New Mexico State Personnel Office*, 399 F.3d 1248 (10th Cir. 2005).

F. Sanction of Attorney for filing frivolous appeal.

The Court of Appeals sanction of the attorney for petitioners for filing a frivolous appeal of the District Court's dismissal of petitioners' verified complaint cannot be justified under the facts and circumstances of this case.

The frivolousness standard-which is intended to discourage baseless lawsuits is not applicable to this case. In this case the appeal of the dismissal was rationally related to existing law and credible factual allegations and therefore could not reasonably be considered to be frivolous. *Neitzke v. Williams*, 490 U.S. 319 (1989)

FRAP 38 provides that an appellate court may award sanctions against an appellant who brings a frivolous appeal. Fed. R. App. 38; *Jansen v. Aaron Process Equip. Co.*, 207 F.3d 1001, 1005 (7th Cir. 2000). An appeal is frivolous "when the result is obvious or when the appellant's argument is wholly without merit." *Speigel v. Cont'l Nat'l Bank*, 790 F.2d 638, 650 (7th Cir. 1986). This standard is not applicable in this case.

In the instant case the result that is most obvious is that the district court's failure to convert respondents' Rule 12 (c) Motion for Judgment on the Pleadings to a motion for summary judgment as required under the rule, committed reversible error which could and should have been appealed to the Court of Appeals based on Seventh Circuit precedent. *Jacobs v. City of Chicago*, *supra*. Further, by failing to give reasons and explanation for granting the Motion to Dismiss

the district court violated Circuit R. 50. It is also disturbing that the Court of Appeals did not enforce its own rules. Therefore, the arguments on appeal challenging the dismissal cannot be considered wholly without merit.

Sanctioning the attorney for bringing an appeal of the district court order dismissing the complaint with prejudice in this case, where there remains an unanswered question as to whether petitioners' complaint stated a claim upon which relief could be granted and the total absence of any legal justification why the district court granted the 12 (c) Motion for Judgment on the Pleading, is wholly inappropriate.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER IT IS PROPER FOR A COURT OF APPEALS ON INTERLOCUTORY APPEAL TO FULLY DISCUSS AND GIVE ITS OPINION ON THE MERITS OF THE UNDERLYING COMPLAINT AND NOT DECIDE THE CASE ON THE MERITS.

The Court of Appeals sole mandate was to affirm or reverse the district court's denial of petitioners' Motion for Preliminary Injunction and remand the case. *Kool Mann Coffee & Co. v. Coffey*, 300 F.3d 340 (3rd Cir. 2002)

In the instant case the Court of Appeals did not dismiss the verified complaint; direct the district court on remand to dismiss the case; order that the case be dismissed, or decided the case on the merits. Instead the Court "suggested" that the District Court should dismiss the suit without further ado after expressing at length its views on the merits of petitioners' Fourteenth Amend due process claims and their ability to show a property and liberty interest in their state

issued insurance and surety bail bond licenses; the potential impact the Federal Court Improvement Act of 1996 amendment would have on petitioners' Section 1983 claim; and the applicability of absolute judicial immunity under Section 1983. Consequently, the views expressed by the panel in the opinion affirming the denial of the Motion for Preliminary Injunction should be read as dicta. *Id.*

The scope of the Court of Appeals review, in the ordinary course, was to determine whether the district court abused its discretion by denying on the grounds that there was not a likelihood that petitioners would succeed on the merits of their claims. Such limited review is normally is appropriate, in as much as the primary purpose of the preliminary injunction is to preserve the relative positions of the parties. *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 387-91 (Fed. Cir. 1987); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 755 (1986); *See Doran v. Salem Inn, Inc.*, 422 U.S., at 931-932; *Brown v. Chote*, 411 U.S. 452, 456-457 (1973); *University of Texas, et al. v. Camenisch*, 451 U.S. 390, 395 (1981) ("it is generally inappropriate for a federal court at the preliminary injunction stage to give final judgment on the merits")

The necessity for an expeditious resolution often means that the injunction is issued [or denied] on a procedure less stringent than that which prevails at the subsequent trial on the merits of the application for injunctive relief. *See United States Steel Corp. v. Fraternal Assn. of Steelhaulers*, 431 F.2d 1046, 1048 (CA 1970); *see also Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310.

The United States Supreme Court has stated that the approach described above is not inflexible; it is a rule of orderly judicial administration, not a limit on judicial power. *Thornburgh*, 476 U. S. at 758 (1986) The Supreme Court on more than one occasion has approved proceedings deviating from the stated norm. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (District Court issued preliminary injunction restraining the Secretary of Commerce from seizing the Nations' steel mills. The Court of Appeals stayed the injunction. The Supreme Court found that the case was ripe for review, despite the early stage of the litigation, and went on to address the merits.); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (when unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state court review. No issue of unconstitutionality is raised in the instant case.

The cases in this area indicate, that if a district court's ruling rests solely on a premise as to the applicable law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction. *Thornburgh*, 476 U.S. at 758 (1986) In the instant case the decision by the district court was made the day after the Motion for Preliminary Injunction was filed and before any of the respondents appeared in the case and in some instances before return on summons had been filed. The only facts before the district court at the time that it denied the Motion for Preliminary Injunction were set forth in petitioners' verified complaint.

Clearly, no facts were established and the ruling did not rest solely on a premise as to the applicable rule of law as related to petitioners' Fourteenth Amendment due process

claims, absolute immunity and applicability of Section 1983 as amended. In addition at the time the district court denied the motion there was and remains disagreement as to the law applicable to petitioners' claims and the issue of probability of success on the merits which depended on facts that would emerge during discovery and be presented at trial on application for summary judgment. Success on the merits was the central theme of the district court order denying the motion for preliminary injunction. *Id.*

The petitioners and others similarly situated have been deeply prejudiced by the Court of Appeal's interlocutory decision because the question of whether they hold a liberty and property interest in their state issued licenses has not been judicially determined on the merits, but the Court of Appeals *non decision-decision* has been published. Petitioners have been left in legal limbo and denied the benefits to which they are entitled under state law and regulations by the Court's decision while the respondents continue to enforce the cash only bail bond policy against them. The situation has been exacerbated by the Court of Appeals issuing a nine (9) line Per Curiam order affirming the dismissal of the complaint without stating specific reasons or analysis as to why it affirmed the dismissal of petitioners' complaint.

The Court of Appeals decision affirming the dismissal complicates and makes problematic the drafting of this Petition for Writ of Certiorari. First, because it is not known for certain whether the district court dismissed the complaint out of unrestricted deference to the Court of Appeals, without independently deciding for itself, as it is required to do under Circuit R. 50, whether the complaint should have been dismissed under the strict ". . . unless it appears beyond all

doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief" dismissal standard, or believed that the interlocutory opinion did, under the law, constitute the law of the case as to all of petitioners claims. See Conley v. Gibson, Supra.

Finally, and most important, the court's pro and con discussion of the merits of the complaint prejudiced petitioners because it led directly to the filing of the Rule 12 (c) Motion for Judgment on the Pleadings in which they claimed that the Court of Appeals decision itself, which was submitted to the district court in support of the motion, constituted the law of the case as to all of petitioners' claims and thereby deprived them of their day in court without due process.

CONCLUSION

For all the foregoing reasons, law and argument, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

DOUGLAS M. GRIMES
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Attorney for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 29, 2005

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 2005

Before

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 05-1106

HERBERT SMITH, and all similarly situated bail agents doing business as, EXPRESS BONDS INCORPORATED, INDIANA SURETY BAIL AGENTS ASSOCIATION INCORPORATED, MIDWEST BONDING INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF HAMMOND, HAMMOND CITY COURT, JEFFREY A. HARKIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.

Appendix A

The following is before the court: VERIFIED STATEMENT AS TO WHY IMPOSITION OF SANCTIONS NOT APPROPRIATE, filed on July 7, 2005, by counsel for the appellants.

IT IS ORDERED that attorney Douglas M. Grimes is sanctioned for the filing of a frivolous appeal and shall pay the attorney's fees and costs incurred by the appellees in defending the appeal. Counsel for the appellees shall file a statement of fees and costs with this court by September 12, 2005.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 17, 2005

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 9, 2005
Decided June 17, 2005

Before

Hon. Joel M. Flaum, *Chief Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Ilana Diamond Rovner, *Circuit Judge*

No. 05-1106

HERBERT SMITH, and all similarly situated bail agents doing business as, EXPRESS BONDS INCORPORATED, INDIANA SURETY BAIL AGENTS ASSOCIATION INCORPORATED, MIDWEST BONDING INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF HAMMOND, HAMMOND CITY COURT, JEFFREY A. HARKIN, et al.,

Defendants-Appellees.

Appendix B

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.

ORDER

PER CURIAM. In affirming the denial of the plaintiffs motion for a preliminary injunction, we stated that "in view of the plainly meritless character of the underlying suit we suggest that the district judge dismiss it without further ado. If Smith persists in this hopeless litigation, he—and his lawyer—are courting sanctions." 388 F.3d 304, 308 (7th Cir. 2004). The district judge promptly dismissed the suit. Smith foolishly has appealed. His appeal briefs, riddled with errors of fact and law, rehash the arguments rejected in our opinion on the appeal from the denial of the preliminary injunction. The dismissal is affirmed and Smith is ordered to show cause within 14 days why he and/or his lawyer Douglas M. Grimes should not be sanctioned for the filing of a frivolous appeal.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION DATED DECEMBER 15, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NO. 2:03-CV-542

HERBERT SMITH d/b/a EXPRESS BAIL BONDS, et al.,

Plaintiffs,

vs.

CITY OF HAMMOND, et al.,

Defendants.

ORDER

This matter is before the Court on the Motion for Judgement [sic] on the Pleadings, filed by Defendants on November 24, 2004. After due consideration, and in light of the analysis contained in *Warren v. City of Hammond, Indiana*, 388 F.3d 304 (7th Cir. 2004), the motion is **GRANTED.** The Clerk is **ORDERED** to **DISMISS WITH PREJUDICE** Plaintiff's claims. The Clerk is **FURTHER ORDERED** to close this case.

Appendix C

To alleviate any potential confusion, nothing in this order or any other order of this Court should be construed to interfere with the rights of any of the parties to appeal this decision to the Seventh Circuit Court of Appeals. Furthermore, nothing in this order or any other order of this Court should be construed to interfere with the rights of any of the parties to further appeal this Court's decision of December 23, 2003.

DATED: December 15, 2004

S/ RUDY LOZANO, Judge
United States District Court

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED NOVEMBER 3, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1260

HERBERT SMITH,

Plaintiff-Appellant,

v.

CITY OF HAMMOND, INDIANA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 03 C 542—Rudy Lozano, *Judge.*

ARGUED SEPTEMBER 10, 2004—DECIDED NOVEMBER 3, 2004

. Before FLAUM, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges.*

POSNER, *Circuit Judge.* A woman named Leatrice Warren was arrested by the Hammond police and charged with a variety of relatively minor (as these things go) offenses, including battery, intimidation, possession of marijuana, disorderly conduct, and resisting arrest, all probably arising from the same incident and

eventually resolved by a plea agreement the terms of which we do not know. When she was arrested, Judge Harkin of the Hammond City Court set bail at $6,800 "cash only." This meant that to get out of jail Warren would have to deposit 10 percent of the amount of the bail—$680—with the court. Ind.Code § 35-33-8-3.2(a)(2). If she complied with the conditions of bail (which is to say if she didn't skip town), the money would be returned to her, minus certain offsets (administrative fees, restitution if ordered, fines if imposed). *Id.; Obregon v. State,* 703 N.E.2d 695 (Ind.App.1998). Warren's family had paid our plaintiff, Herbert Smith, who is a bail bondsman licensed by the State of Indiana, a $680 premium for a $6,800 surety bond. But the police, at the judge's direction, refused to accept the bond, instead insisting on the cash bond in the same amount. This meant that Smith—assuming he returned the premium to his client—was out the $680.

One wonders why Warren's family would pay Smith a nonrefundable $680 when the same $680, deposited with the court, would (depending on the outcome of the criminal proceeding) be largely refundable. Because the family didn't know any better, perhaps being misled by Smith? Or did the family perhaps want Smith to be on the hook for the rest of the bond when Warren skipped? But then, if Smith had the same thought about the likely outcome, he would not have agreed to underwrite a bond.

Even more mysterious is that Warren originally was a co-plaintiff with Smith in this lawsuit, though she later dropped out.

Appendix D

Upset that the bond had been refused, Smith brought this suit under 42 U.S.C. § 1983 against the judge, the city clerk and the city police chief, the judge's court, and the City itself, contending that the defendants have a policy of refusing to accept surety bonds and that this policy violates the U.S. Constitution by depriving Smith of a property interest consisting of his license. His license is worthless, he contends, if he cannot write surety bonds in Hammond because the court will accept only cash bonds. The suit seeks damages but his appeal is from the denial of his motion for a preliminary injunction, which he sought on the ground that damages will be difficult to determine and that therefore he is incurring irreparable harm.

Not only has the appeal no merit, but it is evident that the entire suit should be dismissed. Three of the four defendants—the City, the clerk, and the police chief—do not belong in the case at all. None of them has, or is claimed to have asserted, any authority over the setting of bonds. (Regarding the City's liability, see, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-80, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).) Smith might just as well have sued the Governor of New Mexico. In Indiana as elsewhere, "the power to establish bail is exclusively judicial." *Board of County Commissioners v. Farris*, 168 Ind.App. 309, 342 N.E.2d 642, 644 (Ind.App.1976); see also Ind.Code §§ 35-33-8-3.2(a), -4; cf. *Walden v. Carmack*, 156 F.3d 861, 874 (8th Cir.1998); *Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir.1995) (per curiam). And though an official who lacked legal authority over some matter might nevertheless use his official status ("color of law") to influence the officials who did have the relevant jurisdiction, Smith doesn't indicate what role he thinks the clerk or the police chief plays in Judge Harkin's bail decisions except to execute them. As mere

executants they would be sheltered by the judge's absolute immunity (of which more shortly), *Snyder v. Nolen,* 380 F.3d 279, 287 (7th Cir.2004) (per curiam); *Richman v. Sheahan,* 270 F.3d 430, 435 (7th Cir.2001); *In re Foust,* 310 F.3d 849, 855 (5th Cir.2002); *Clay v. Allen,* 242 F.3d 679, 682 (5th Cir.2001), and even as collaborators they would be sheltered by the absence of any established Fourteenth Amendment entitlement to issue a surety bond. We can even delete "established." The decision to require either a cash bond or a surety bond is a discretionary judicial act, *Mott v. State,* 490 N.E.2d 1125, 1129 (Ind.App.1986), and therefore no bondsman has a sufficiently firm and definite interest in the issuance of a surety bond to be adjudged a Fourteenth Amendment property holder. *Baldwin v. Daniels,* 250 F.3d 943, 946-47 (5th Cir.2001) (per curiam)

As for Judge Harkin, he has, of course, absolute immunity from liability for damages arising from judicial acts, and the setting of bail is one of them. *Mireles v. Waco,* 502 U.S. 9, 11-13, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (per curiam); *Stump v. Sparkman,* 435 U.S. 349, 362-64, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Brokaw v. Mercer County,* 235 F.3d 1000, 1015 (7th Cir.2000); *Tucker v. Outwater,* 118 F.3d 930, 932-33 (2d Cir.1997); *Franceschi v. Schwartz, supra,* 57 F.3d at 830; *King v. Love,* 766 F.2d 962, 968 (6th Cir.1985). It is true that the core concern animating absolute immunity for judges is the prospect of malicious suits by disappointed litigants, and Smith was not a party to the suit in which Judge Harkin issued the order of which Smith is complaining. But that is not a saving grace when one considers how common it is for judicial rulings to have adverse effects on nonparties that might prompt them to seek judicial revenge against the judge.

Smith also seeks injunctive relief against the judge, but here he runs up against a 1996 amendment to 42 U.S.C. § 1983 that provides "that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub.L. No. 104-317, § 309(c), 110 Stat. 3847, 3853. Setting bail is a judicial act, as we said, and the exception involving declaratory relief is inapplicable to this case. Declaratory relief is not unavailable just because it is not an award of damages—yet that is Smith's argument.

What is more, we don't see how a motion for a preliminary injunction can be premised on the difficulty of determining damages—Smith's only ground—when the defendant is absolutely immune from damages liability. It would be beyond odd to argue for preliminary relief on the ground that one had no legal right to permanent relief, when it is only the existence of a probability of eventually prevailing that entitles a plaintiff to seek preliminary relief to protect his expectation. Similarly, while in some cases it might be argued that a defendant's immunity from damages liability might constitute irreparable harm entitling the plaintiff to preliminary relief, *Hillhaven Corp. v. Wisconsin Dept. of Health & Social Services*, 733 F.2d 1224, 1226 (7th Cir.1984) (per curiam); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 361-62 (4th Cir.1991), this argument won't fly in a case such as this in which the defendant (by virtue of the 1996 amendment to section 1983) is immune from being enjoined as well as from having to pay damages. As Smith is not entitled to obtain a final judgment awarding him either monetary or equitable relief against Judge Harkin, he cannot obtain

preliminary relief, which is merely a way station to final relief. (He comes perilously close to arguing that the weaker the case, the stronger the argument for preliminary relief.) Nor can the absolute immunity of a judge be got round by suing his employer (in this case the Hammond city court) on a theory of respondeat superior, which is not a basis of liability authorized by section 1983.

So everywhere Smith might turn, relief is blocked; and anyway his theory of liability—that by insisting on cash bonds Judge Harkin is arbitrarily depriving him of his license in violation of the due process clause of the Fourteenth Amendment—has no merit even on its own grounds, that is, even ignoring issues of immunity. Judge Harkin is not depriving Smith of his license, but merely reducing Smith's income from it. A provider of services to a court has no standing to challenge judicial rulings that reduce the demand for his services and hence his income. He is injured but he is not within the protected class. If a judge who is "soft" on crime releases arrested persons on their own recognizance, a bail bondsman cannot challenge the judge's ruling on the ground that it will reduce the bondsman's business. Manufacturers of shackles cannot sue when a judge decides that criminal defendants shall not be shackled in his courtroom. Smith could not sue the prosecutor for not bringing enough charges for violent crime (the sort that lead to surety bonds), or for charging too many poor defendants on the theory that the public fisc does not pay as handsomely as solvent defendants do. When the Federal Reserve juices up the economy, pawnbrokers cannot head to court to stop the undermining of their livelihoods.

As if this weren't enough to demonstrate the frivolous nature of this suit, Smith is claiming a violation of the Fourteenth

Amendment, which requires that he show an entitlement that can be characterized as property or liberty to issue surety bonds, and we saw earlier that he cannot show that.

We add unnecessarily that Judge Harkin's policy is not arbitrary. The difference between cash bonds and surety bonds is, as we mentioned, that if the defendant has a cash bond and complies with its terms he has a shot at getting his money back, but if he has a surety bond he doesn't get the premium back, typically, as in this case, 10 percent of the face amount of the bond. *Lake County Clerk's Office v. Smith*, 766 N.E.2d 707, 709-10 (Ind.2002); Holly J. Joiner, Note, "Private Police: Defending the Power of Professional Bail Bondsmen," 32 *Ind. L.Rev.* 1413, 1417 (1999). If the defendant is a substantial flight risk, the judge, as an alternative to increasing the amount of bail and thus the amount of a cash bond, may require the posting of a surety bond, to get the bondsman's assessment of the risk (which will determine the premium) and also his aid in assuring compliance with the terms of bail, since the bondsman will have to pay if they are violated. *Id.* at 1422-27. But this is a judgment for the judge to make—not the bondsman by suing the judge. It is, moreover, a discretionary judgment, as we noted earlier.

The denial of the motion for a preliminary injunction is affirmed, and in view of the plainly meritless character of the underlying suit we suggest that the district judge dismiss it without further ado. If Smith persists in this hopeless litigation, he—and his lawyer—are courting sanctions.

AFFIRMED.

Appendix D

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION ENTERED DECEMBER 23, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NO. 2:03-CV-542

LEATRICE WARREN, and all similarly situated, and
HERBERT SMITH d/b/a EXPRESS BAIL BONDS,
and all similarly situated,

Plaintiffs,

vs.

CITY OF HAMMOND, HAMMOND CITY COURT, et al.,

Defendants.

ORDER

This matter is before the Court on the Motion for Preliminary Injunction and Motion for Temporary Restraining Order and Preliminary Injunction, both filed by Plaintiffs on December 22, 2003. For the reasons set forth below, both of the motions are **DENIED**.

Appendix E

BACKGROUND

Plaintiff, Leatrice Warren, was arrested on December 12, 2003, by the Hammond Police Department, and charged with the following five state law offenses: 1) battery on law enforcement; 2) intimidation; 3) possession of marijuana; 4) disorderly conduct; and 5) resisting law enforcement. The Honorable Jeffrey A. Harkin of the Hammond City Court set bail at $6,800, cash only. Warren does not have $6,800 cash, and is currently incarcerated in the Lake County jail. Plaintiff, Herbert Smith d/b/a Express Bail Bonds ("bail agent"), wrote a surety bond for Warren, in the amount of $6,800, after receiving the applicable premium from Warren's family. Defendants have refused to accept the bail bond, instead insisting on $6,800 cash.

Plaintiffs filed the instant action, claiming the action of Defendants is unconstitutional. More specifically, Plaintiffs claim the City of Hammond has a policy of *always* requiring cash-only bonds. In other words, surety or personal bonds are never enough under this alleged policy. According to Plaintiffs, this violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, not to mention Article I, section 17 of the Indiana State Constitution. Plaintiffs request the immediate action of a temporary restraining order, otherwise bail agent is prevented from doing business with clients whose bail is set by Judge Harkin, and Warren will remain in jail at least until her next court appearance of January 15, 2004.

Appendix E

DISCUSSION

To prevail on a motion for a preliminary injunction, Plaintiffs must show that 1) their case has a likelihood of success on the merits; 2) no adequate remedy at law exists; and 3) they will suffer irreparable harm if the injunction is not granted. *See FoodComm Intl v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003) (citing *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002)); *see also Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If these three conditions are met, the Court must balance the harm to Plaintiffs if the injunction is not issued against the harm to Defendants if it is issued. *See Barry*, 328 F.3d at 303 (citing *Storck v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994)). This balancing involves a sliding scale analysis: the greater Plaintiffs' chances of success on the merits, the less strong a showing they must make that the balance of harm is in their favor. *Id.*

As for the Fifth Amendment claim, the Court finds Plaintiffs' claim does not have a likelihood of success on the merits. The action would not be successful because Plaintiffs have failed to argue the issue. Warren claims in a heading in her brief that her pretrial incarceration violates the Fifth Amendment, but nowhere else in that section does Warren make any Fifth Amendment arguments. There is, however, one sentence stating what the Fifth Amendment prohibits, but nothing more. There is nothing else on the subject, such as an argument as to how that sentence applies to the facts of this case. Undeveloped arguments will likely not be successful, since this Court will not develop arguments for

the parties. *Tyler v. Runyon*, 70 F.3d 458, 564-65 (7th Cir. 1995) (recognizing that courts need not and indeed should not expend limited judicial resources in researching, refining, and otherwise fleshing out arguments the parties themselves do not adequately support); *Weissman v. Weener*, 12 F.3d 84, 86 (7th Cir. 1993) ("[J]udges should be hesitant to wander too far astray - in their search for the correct legal result - in arguments presented to them by the parties. When judges do so, one consequence is to 'diminish the responsibility of lawyers and reduce competition among them.'") (citation omitted) ; *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (refusing to consider an argument that was briefed in a "perfunctory and undeveloped[] manner"). Furthermore, the Fifth Amendment applies generally to action of the federal government, not state action, as in the instant case. *See Massey v. Wheeler*, 221 F.3d 1030, 1036 n.1 (7th Cir. 2000) (explaining that "[t]he Fourteenth Amendment creates a due process right against the states . . . while the Fifth Amendment guarantees due process by the federal government.").

As for the Eighth Amendment claim, the Court finds Plaintiffs' claims do not have a likelihood of success on the merits. The action does not enjoy a likelihood of success because Plaintiffs have failed to establish any constitutional right to a certain *type* of bond. *See Walden v. Carmack*, 156 F.3d 861, 874 (8th Cir. 1998). In *Walden*, the sheriff would not accept a property bond in lieu of a cash bond. Id. at 867. The Eighth Circuit Court of Appeals explained plaintiffs had "failed to show that clearly established Eighth Amendment law exists requiring a property bond to be accepted in lieu of a cash bond, or that a reasonable law enforcement officer

would have known, on the information available, that his or her actions violated clearly established Eighth Amendment law . . ." *Id.* at 874. By analogy to this case, Plaintiffs have simply argued Warren has a constitutional right to not have an excessive bail, but have failed to show Warren has a constitutional right to execute a specific *type* of bond or to argue that $6,800 is an excessive bail. While Plaintiffs have also claimed a violation of Article I, section 17 of the Indiana State Constitution, they have failed to show they have a state constitutional right to a specific type of bail. Once again, Plaintiffs have stated what the constitution protects, but have failed to explain how that protection would prohibit the alleged wrongs in the instant case.

As to Defendant, Jeffrey A. Harkin, Judge of the Hammond City Court ("Judge Harkin"), the Court finds Plaintiffs' claims do not have a likelihood of success on the merits. The action against Judge Harkin does not enjoy a likelihood of success because it does not appear this Court has subject matter jurisdiction to entertain such claims against the state judge. As another district court has explained:

> To decide this claim, the district court would have to go beyond the mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court to the particular factual circumstances of [the plaintiffs'] case. The plaintiffs do not show that either the [state] Supreme Court or the [local state court] has promulgated any rule or regulation requiring "cash only bonds". . . . Courts have generally concluded that claims are inextricably intertwined when the

> district court must scrutinize both the challenged rule and the state court's application of that rule. That the plaintiffs can see some pattern or routine in the state court decisions does not elevate the separate bail bond decisions into a promulgated rule or policy.

Mounkes v. Conklin, 922 F. Supp. 1501, 1510 (D. Kan. 1996) (citations and quotations omitted). To put it another way, it appears Plaintiffs will likely not succeed, as it appears the *Rooker-Feldman* doctrine applies in this case. This doctrine "precludes federal jurisdiction even when the state court's decision implicates federal constitutional issues, or when the plaintiff brings his federal action under federal civil rights statutes." *Id.* at 1509 (citations omitted); *see generally District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The Seventh Circuit Court of Appeals has explained "if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. *Schmitt v. Schmitt*, 324 F.3d 484, 485-486 (7th Cir. 2003).

As to Defendants, City of Hammond, Robert J. Golec, Clerk of the City of Hammond, and John E. Corey, Chief of the Hammond Police Department, the Court finds Plaintiffs' claims against these Defendants do not have a likelihood of success on the merits. The action does not enjoy a likelihood of success as to these Defendants because they do not appear to be proper parties to the action. One of the key authorities of Plaintiffs' arguments is the comprehensive statutory bail

scheme found throughout Title 35 of the Indiana Code. Ind. Code 35-33-8-1, *et seq.* The Court has examined these statutes and found these Defendants cannot be held responsible for the imposition of a cash-only bond. As stated by another court in this district,

> In I.C. 35-33-8-3, the statute makes it clear that the *court* has the power to admit a defendant to bail, and I.C. 35-33-8-4(a) indicates that it is the court's responsibility to determine the amount of the bail, and if the court fails to set an amount of bail, the sheriff . . . must present the warrant to the judge of the court so that the judge may then set an amount of bail.

Sanders v. City of Ft. Wayne, 616 F. Supp. 467, 469 (N.D. Ind. 1985) (emphasis in original).

Plaintiffs have not made any showing to this Court as to how these Defendants are proper, given the plain language of the relevant Indiana statutory provisions. The statutes which Plaintiffs rely refer to the court and to the sheriff, but the City of Hammond, Golek, and the chief of the Hammond Police Department are all neither a court nor a sheriff. In other words, it appears the function of determining the appropriateness of the amount of bond lies solely with the judicial officer, and in limited circumstances, the sheriff. *See Walden*, 156 F.3d at 874. Perhaps the City of Hammond or the chief of police make recommendations regarding bond, but the setting of bond is likely at the discretion of Judge Harkin. Thus, it does not appear likely Plaintiffs will enjoy success on their claims against these Defendants.

Appendix E

Finally, bail agent asserts he was denied substantive due process under the Fourteenth Amendment. He claims he has been deprived of his property interest in his bail agent license, along with his right to make a living as a bail agent. He also claims he has been denied the equal protection of the laws under the Fourteenth Amendment. More specifically, bail agent will continue to lose income because he is not allowed to practice his profession as a bail agent in the Hammond City Court. He alleges his Fourteenth Amendment property interest in his license is violated by Defendants' failure to accept surety bond. Even assuming that this is true, this Court fails to see why bail agent's remedies at law are not adequate. *See, e.g., Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755 (2d Cir. 1979) (damages resulting from the loss of customers is provable, recoverable at law, and therefore not grounds for a preliminary injunction). This Plaintiff has made no showing that any business loss cannot be compensated by money damages.

Accordingly, the Motion for Preliminary Injunction and Motion for Temporary Restraining Order and Preliminary Injunction are **DENIED.**

DATED: December 23, 2003

S/ RUDY LOZANO, Judge
United States District Court

APPENDIX F — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 14
UNITED STATES CONSTITUTION

§ 1. Citizenship — Due process of law — Equal protection.

No state shall . . . deprive any person of life liberty, or property, without due process of law . . . .

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person . . . under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . except that in any action brought against a judicial officer for an act . . . taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

28 U.S.C. § 1915. Proceedings in forma pauperis

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(B) the action or appeal—

(i) is frivolous . . .

Appendix F

INDIANA STATE STATUTES

Indiana Code 27-1-2-3.

(d) The term "company" or "corporation" means an insurance company . . . .

(x) The term "insurer" means a company . . . making any kind . . . of insurance . . . .

Indiana Code 27-1-3-10.

The commissioner shall have power:

(1) to revoke or suspend the authority to do business in this state of any company which refuses to permit an examination under IC 27-1-3.1;

(2) to revoke or suspend any certificate of authority when any condition prescribed by law for granting it no longer exists.

Indiana Code 27-1-3-19.

(a) Whenever the commissioner determines that any insurance company . . . .

(b) . . . fails, neglects, or refuses to comply with any order or rule of the department . . . within thirty (30) days after its receipt by the insurance company . . . the commissioner may bring an action against any such insurance company, to compel that compliance.

Appendix F

Indiana Code 27-3-20.

(a) The commissioner may issue a certificate of authority to any company . . . authorizing and empowering the company to make the kind or kinds of insurance specified in the certificate. . . .

No certificate of authority shall be denied, . . . until notice, hearing, and right of appeal has been given as provided in IC 4-21.5.

Indiana Code 27-1-5-1.

A company . . . authorized to transact business in Indiana, may make . . . kinds of insurance . . . .

(k) To become surety or guarantor for . . . the performances by any person . . . to become surety or guarantor for the performance of insurance contracts where surety bonds are required by states or municipalities . . . . ;

(3) risks of the classes commonly known as fidelity insurance and surety bonds;

Indiana Code 27-1-6-18.

When the . . . department has made an investigation and examination . . . the commissioner may issue a certificate of authority under IC 27-1-3-20 . . . .

Appendix F

Indiana Code 27-10-1-10.

"Surety" means any person who agrees to pay the bond in the event the defendant fails to appear in court at the scheduled date and time.

Indiana Code 27-10-2-4.

Every surety for the release of a person on bail shall be qualified as:

(1) an insurer as defined and meeting the qualifications prescribed in IC 27-1-5-1, and represented by a bail agent as defined in and meeting the qualifications prescribed in this article; or

(2) a person . . . .

Indiana Code 27-10-3-1.

(a) A person may not act in the capacity of a bail agent . . . or perform any of the functions, duties, or powers prescribed for bail agents . . . unless the person is qualified and licensed . . . .

Indiana Code 27-10-3-8.

(a) The commissioner shall deny, suspend, revoke, or refuse to renew any license issued under this article for . . . causes . . . .

Appendix F

Indiana Code 27-10-3-9.

(a) If . . . the commissioner determines that a licensed bail agent . . . has been guilty of violating any . . . laws of this state relating to bail bonds . . . the commissioner shall, upon ten (10) days notice in writing to:

(1) the bail agent . . . ; and

(2) the insurer represented by the bail agent . . . accompanied by a copy of the charges of the unlawful conduct of the bail agent . . . suspend the license of the bail agent unless . . . . the bail agent . . . makes a written response to the commissioner concerning the charges.

(b) If . . . the bail agent . . . files a written response denying the charges within the time specified, the commissioner shall call a hearing within a reasonable time for the purpose of taking testimony and evidence on any issue of facts made by the charges and answer.

(c) The commissioner shall give notice to:

(1) the bail agent or the recovery agent; and

(2) the insurer represented by the bail agent . . . of the time and place of the hearing . . . .

(d) If, following the hearing, the commissioner determines by a preponderance of the evidence that the bail agent . . . is guilty as alleged in the charges . . . the commissioner shall:

(1) revoke the license of the bail agent or the recovery agent; or

(2) suspend the bail agent for a definite period of time to be fixed in the order of suspension

Indiana Code 27-10-3-18

A person who holds a valid bail agent's license issued by the . . . commissioner and registered as required . . . may have equal access to the jails of this state for the purpose of making bond . . . .

Indiana Code 33-35-2-1

(a) A judge of a city or town court:

(1) may adopt rules for conducting the business of the court;

(2) has all powers incident to a court of record in relation to:

(A) the attendance of witnesses;

(B) the punishment of contempts;

(C) the enforcement of its orders; and

(D) the issuance of commissions for taking depositions in cases pending in the court;

(3) may administer oaths; and

(4) may give all necessary certificates for the authentication of the records and proceedings of the court.

Indiana Code 33-35-2-3.

A city court has the following jurisdiction over crimes, infractions, and ordinance violations:

(1) Jurisdiction of all violations of the ordinances of the city.

(2) Jurisdiction of all misdemeanors and all infractions.